MOTION FILED
JUN 28 1999

(16)

No. 98-8384

IN THE
Supreme Court of the United States

TERRY WILLIAMS,
Petitioner,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF PROFESSORS LANCE G. BANNING, JACK N. RAKOVE, WILLIAM W. VAN ALSTYNE, AND GORDON G. YOUNG IN SUPPORT OF PETITIONER

BARRY LEVENSTAM
Counsel of Record
JEFFREY T. SHAW
JEREMY M. TAYLOR
KENDRA S. COLLIER
JENNER & BLOCK
ONE IBM PLAZA
CHICAGO, IL 60611

Counsel for Amici Curiae

38pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

MOTION OF PROFESSORS LANCE G. BANNING, JACK N. RAKOVE, WILLIAM W. VAN ALSTYNE, AND GORDON G. YOUNG FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER 1

INTEREST OF AMICI CURIAE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE FRAMERS DID NOT INTEND ARTICLE III COURTS TO ACCORD DEFERENCE TO A STATE COURT'S RULINGS ON MATTERS OF FEDERAL CONSTITUTIONAL AND STATUTORY LAW 5

A. This Court Has Long Turned To The Records Of The Constitutional Convention To Discern The Framers' Intent 7

B. The Convention Records Reveal That The Framers' Constitutional Design Forbade Federal Courts, Exercising The "Judicial Power," To Defer To State Court Decisions On Matters "Arising Under" Federal Law 8

1. The Opening Days of the Convention, and the Virginia Plan 9

2. The Form and Role of the Federal Judiciary 12

3. The Jurisdiction of the Federal Judiciary 14

4. The "judicial Power" 16

5. Conclusion: The Framers' Intent 18

II. THIS COURT HAS HELD THAT AN ARTICLE III COURT, EXERCISING THE "JUDICIAL POWER," CANNOT BE DIRECTED TO DEFER OR GIVE EFFECT TO A STATE COURT'S ERRONEOUS RULING OF LAW 19

A. This Court Has Long Guarded The "Judicial Power" From Unconstitutional Infringements 19

B. This Court Has Consistently Held That An Article III Court Cannot Be Limited In The Exercise Of The "Judicial Power" When Reviewing State Court Decisions 23

1. Applying *Marbury* to Federal Judicial Review of State Court Decisions: *Cohens v. Virginia* 23

2. The "Paramount Judicial Authority" of Article III Courts: *Martin* and *Ableman* 25

3. The "judicial Power" and Mixed Questions of Law and Fact: *Crowell* and its Progeny 26

4. Conclusion: The "judicial Power" and AEDPA .. 29

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Page

Ableman v. Booth,
62 U.S. (21 How.) 506 (1858) 19, 25, 26

Buckley v. Valeo, 424 U.S. 1 (1976) 8

Clinton v. Jones, 520 U.S. 681 (1997) 26

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) ... 19, 23, 24

Crowell v. Benson, 285 U.S. 22 (1932) 6, 19, 27

Felker v. Turpin, 518 U.S. 651 (1996) 13

Gallegos v. Nebraska, 342 U.S. 55 (1951) 28

Hunter v. Martin, 18 Va. (4 Munf.) 1 (1814) 25

INS v. Chadha, 462 U.S. 919 (1983) 7, 8

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 5, 19, 20

Martin v. Hunter's Lessee,
14 U.S. (1 Wheat.) 304 (1816) 13, 19, 25

Michaelson v. United States, 266 U.S. 42 (1924) 19

Monell v. Department of Social Services,
436 U.S. 658 (1978) 24

Myers v. United States, 272 U.S. 52 (1926) 10

New York v. United States, 505 U.S. 144 (1992) 8, 10

Norris v. Alabama, 294 U.S. 587 (1935) 28, 29

Pacemaker Diagnostic Clinic of America, Inc. v. Instro-Medix, 725 F.2d 537 (9th Cir.), *cert. denied*, 496 U.S. 826 (1984) 21

Pierre v. Louisiana, 306 U.S. 354 (1939) 28

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995) 26

Powell v. McCormack, 395 U.S. 486 (1969) 8

Printz v. United States, 521 U.S. 898 (1997) 10

Thompson v. Keohane, 516 U.S. 99 (1995) 28

United Gas Public Service Co. v. Texas, 303 U.S. 123 (1938) 28

United States v. Klein, 80 U.S. (13 Wall.) 128 (1871) ... 19, 21, 22, 24, 26

United States v. Padelford, 76 U.S. (9 Wall.) 531 (1870) 21

United States v. Sioux Nation, 448 U.S. 371 (1980) 26

West Lynn Creamery v. Healy, 512 U.S. 186 (1994) 10

Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998) 6

Wright v. West, 505 U.S. 277 (1992) 28, 29

Yakus v. United States, 321 U.S. 414 (1943) 24

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. III ..... *passim*

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1214 ..... *passim*

28 U.S.C. § 1738 24

28 U.S.C. § 2241(c)(3) 29

28 U.S.C. § 2254(a) 29

28 U.S.C.A. § 2254(d)(1) 6, 29

28 U.S.C. § 2283 24

MISCELLANEOUS

Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (1995) 9

Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030 (1982) 12, 13

Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39 13

The Complete Anti-Federalist (Herbert J. Storing ed., 1981) 14

3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (1866) 12

David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U.L. Rev. 75 19

The Federalist No. 39 (James Madison) (Isaac Kramnick ed., 1987) 16

The Federalist No. 47 (James Madison) (Isaac Kramnick ed., 1987) 14

The Federalist No. 80 (Alexander Hamilton) (Isaac Kramnick ed., 1987) 18

The Federalist No. 81 (Isaac Kramnick ed., 1987) 18

1 Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* (1971) 13

Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362 (1953) 24

James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum. L. Rev. 696 (1998) 10, 12

Henry Paul Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1 (1983) 20

Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121 (1996) 7

9 *The Papers of James Madison 9 Apr. 1786-24 May 1787* (Robert A. Rutland et al. eds., 1975) 10

10 *The Papers of James Madison 27 May 1787-3 Mar. 1788* (Robert A. Rutland et al. eds., 1977) 13

Jack N. Rakove, *James Madison and the Creation Break of the American Republic* (1990) 10

Jack N. Rakove, *Original Meanings* (1996) 7, 8, 11

Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan. L. Rev. 1031 (1997) 11, 14

The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) ..... *passim*

Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17 (1981) 11, 19, 22

William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. 291 (1996) 20

Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 Cath. U. L. Rev. 671 (1997) 18

Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001 (1965) 14

IN THE

Supreme Court of the United States

No. 98-8384

TERRY WILLIAMS,
Petitioner,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION OF PROFESSORS LANCE G. BANNING, JACK N. RAKOVE, WILLIAM W. VAN ALSTYNE, AND GORDON G. YOUNG FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

The individuals listed above hereby move, pursuant to Rule 37.2, for leave to file the attached brief amici curiae in support of petitioner. The consent of petitioner has been obtained and filed with this Court. Respondent has refused to consent to the filing of this brief.

The above-named individuals are law and history professors who have taught and written about the important constitutional issues presented in this case, and who have a strong interest in the proper resolution of those issues by this Court. The attached brief sets forth the above-named individuals' scholarly perspective on these issues and is intended to assist this Court in construing an Act

of Congress in a way that avoids the need for inquiry into the constitutionality of that Act.

For the foregoing reasons, the above-named individuals respectfully request leave to file the attached brief amici curiae in support of petitioner.

Respectfully submitted,

BARRY LEVENSTAM
Counsel of Record
JEFFREY T. SHAW
JEREMY M. TAYLOR
KENDRA S. COLLIER
JENNER & BLOCK
ONE IBM PLAZA
CHICAGO, II 60611

Counsel for Amici Curiae

Dated: June 28, 1999

IN THE

Supreme Court of the United States

No. 98-8384

TERRY WILLIAMS,
Petitioner,

v.

JOHN TAYLOR, Warden,
Sussex 1 State Prison,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF AMICI CURIAE OF PROFESSORS LANCE G. BANNING, JACK N. RAKOVE, WILLIAM W. VAN ALSTYNE, AND GORDON G. YOUNG IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The amici named below are law and history professors who have taught and written about the important constitutional issues presented, directly and indirectly, in this case. This brief sets forth their considered view from a scholarly perspective on those issues, and is intended to serve as an aid to this Court in the correct construction of an Act of Congress, thus avoiding the need for an unnecessary inquiry into the constitutionality of that Act. Amici join in this brief solely on their own behalf and not as representatives of their universities:

Lance G. Banning, Professor of History, University of Kentucky

Jack N. Rakove, Professor of History, Stanford University

William W. Van Alstyne, William and Thomas Perkins Professor of Law, Duke University School of Law

Gordon G. Young, Professor of Law, University of Maryland School of Law .[1]

SUMMARY OF ARGUMENT

The Fourth Circuit below held that Congress's enactment of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 1996 U.S.C.C.A.N. (110 Stat.) 1214 ("AEDPA"), obliges Article III courts to defer to state court rulings on matters "arising under," and dispositive of the meaning of, federal constitutional and statutory law. According to the Fourth Circuit, state court rulings on matters of federal law will control even if the federal court finds them to be erroneous. The federal court is not independently free to adopt or enforce its own understanding of the meaning of federal constitutional and statutory law. Instead, the Article III court must leave in force and effect state decisional law -- even that which the Article III court considers to be in conflict with federal law -- unless the error is so egregious that no reasonable jurist could have made it.

Amici believe that this Court should reject this interpretation of AEDPA -- and thus avoid having to address the constitutionality of AEDPA itself -- because it stands the Framers' fundamental constitutional design on its head. In making provisions for the federal judiciary, the Framers contemplated that Article III judges would be vested with the "judicial Power of the United States," and

---

[1] Pursuant to Rule 37.6, none of the parties authored this brief in whole or in part and no one other than amici or their counsel contributed money or services to the preparation or submission of this brief.

that this "judicial Power" "shall extend to" all cases "arising under" federal constitutional and statutory law. Through the exercise of the "judicial Power," the Framers intended that the federal judiciary, including this Court and the "inferior" courts, serve an important role in cases within their jurisdiction by independently reviewing state decisional law. Rather than permitting an Article III court to defer to a state court's ruling on matters of federal constitutional and statutory law, the Framers insisted that the federal judiciary guarantee that state decisional and other law conform to the "supreme Law of the Land."

This Court also has recognized, as early as *Marbury v. Madison*, that once Congress has "ordain[ed] and establish[ed]" an Article III court, Congress cannot limit or direct that court's exercise of the "judicial Power of the United States." *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-76, 177-80 (1803). Contrary to the decision of the Fourth Circuit, this Court has established that the exercise of the "judicial Power" necessarily includes the power independently to rule on the "whole" legal case, base that review on the "supreme Law of the Land," and grant relief sufficient to effectuate the federal court's view of federal law and to maintain the federal law's supremacy over conflicting state law.

ARGUMENT

I. THE FRAMERS DID NOT INTEND ARTICLE III COURTS TO ACCORD DEFERENCE TO A STATE COURT'S RULINGS ON MATTERS OF FEDERAL CONSTITUTIONAL AND STATUTORY LAW.

This Court should reject a reading of AEDPA that requires an Article III court to defer to state court decisions on matters of federal law, because adopting that interpretation would upset the delicate balance created by the Framers in Article III of the United States

Constitution.[2] *See Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). In relevant part, Article III reads:

> Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .
>
> Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . .

U S. Const. art. III, §§ 1, 2.

The "judicial Power" of an Article III court cannot be limited in the way dictated by the Fourth Circuit. The Framers never intended for a federal court to defer to a state court decision on matters "arising under this Constitution [and] the Laws of the United States." Instead, as revealed in the debates at the Constitutional Convention, the Framers intended that federal courts, once vested with jurisdiction to exercise the "judicial Power," would preserve

---

[2] Section 2254(d)(1) of AEDPA states that a writ of habeas corpus "shall not be granted" by a federal habeas court unless the ruling in the underlying state court action "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The Fourth Circuit below read this provision "to prohibit the issuance of the writ unless (a) the state court decision is in 'square conflict' with Supreme Court precedent that is controlling as to law and fact or (b) if no such controlling decision exists, 'the state court's resolution of a question of pure law rests upon an objectively unreasonable derivation of legal principles from the relevant [S]upreme [C]ourt precedents, or if its decision rests upon an objectively unreasonable application of established principles to new facts.'" *Williams v. Taylor*, 163 F.3d 860, 865 (4th Cir. 1998). "In other words, habeas relief is authorized only when the state courts have decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable." *Id.*

federal law as "the supreme Law of the Land." The exercise of that "judicial Power" mandates that the federal court -- in cases under AEDPA, the federal district court on habeas review -- conduct an independent, complete, and *de novo* review of state court rulings on federal constitutional and statutory law and issue relief sufficient to maintain the supremacy of that law.

A. This Court Has Long Turned To The Records Of The Constitutional Convention To Discern The Framers' Intent.

In May 1787, delegates from the original thirteen states gathered in Philadelphia, Pennsylvania to begin the process of crafting a new constitution. Their debates reflect the concerns and intentions of the exclusive set of individuals who ultimately determined the composition and substance of the Constitution. *See* Jack N. Rakove, *Original Meanings* 13 (1996) (hereinafter "Rakove, *Original Meanings*"). "The absence of any accepted agenda prior to the opening of debates in late May 1787 and the fact that the delegates came to Philadelphia essentially uninstructed by their legislative constituents make the internal deliberations of the Convention the first and most salient set of sources for the original meaning of the Constitution." *Id.* Thus, the records of the Constitutional Convention are "surely among the best places to begin an examination of original understanding." Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 Colum. L. Rev. 121, 139 (1996); *see also* Rakove, *Original Meanings*, at 13 (debates from the Constitutional Convention are the "obvious point of departure" in any examination of the Framers' intent).

This Court has recognized the important role the records of the Constitutional Convention play in examining the Framers' intent. In *INS v. Chadha*, 462 U.S. 919 (1983), for example, this Court considered the Convention debates in striking down the section of the Immigration and Nationality Act that authorized one House of Congress to veto by resolution the decision of the Executive Branch to allow a deportable alien to remain in the United States. This Court found that "[t]he records of the Constitutional Convention

reveal that the requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers." *Id.* at 946. In holding that Congress must comply with this explicit constitutional standard, this Court stated that "[t]he choices we discern as having been made in the Constitutional Convention imposed burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *Id.* at 958; *see also New York v. United States*, 505 U.S. 144, 162-66 (1992) (deriving the Framers' intent from the records of the Constitutional Convention); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976) ("The debates during the [Constitutional] Convention . . . seem to us to lend considerable support to our reading of the language of the Appointments Clause itself."); *Powell v. McCormack*, 395 U.S. 486, 532-41 (1969) (relying on the records of the Constitutional Convention and, in particular, those of the Convention's Committee of Detail).

The central question before the Court in this case -- the extent to which Congress may direct the federal courts, exercising the "judicial Power" under Article III and in keeping with the Supremacy Clause, to defer to the rulings of state courts on matters "arising under" federal law -- was the subject of careful consideration at the Constitutional Convention. Thus, the Convention records provide an "obvious point of departure" here. *See* Rakove, *Original Meanings*, at 13.

B. The Convention Records Reveal That The Framers' Constitutional Design Forbade Federal Courts, Exercising The "Judicial Power," To Defer To State Court Decisions On Matters "Arising Under" Federal Law.

During the Constitutional Convention, the Framers wrestled with several vital questions before finally drafting what is now Article III. Early debate focused on whether the national legislature or the judiciary would shoulder primary responsibility for guaranteeing the supremacy of national law. If the task were

entrusted to the judiciary, the Framers had to determine whether the task could be accomplished by a single Supreme Court, or whether additional "inferior" federal courts were needed. Upon deciding the form of the federal judiciary, the establishment of federal courts' potential jurisdiction also would play a key role in defining the scope of the judiciary's power. And, finally, it was necessary for the Framers to determine what power a federal court would exercise when granted jurisdiction, and whether Congress could limit that power. The Framers' answers to these questions were the product of considerable debate and compromise.

1. The Opening Days of the Convention, and the Virginia Plan.

The Constitutional Convention opened on May 29, 1787, with the failed Articles of Confederation providing the backdrop; in the words of delegate James Wilson, "the business of this convention" was "to correct vices" of the Articles of Confederation. *See* 1 *The Records of the Federal Convention of 1787*, at 20-22 (Max Farrand ed., 1911) (June 8, 1787) (hereinafter "*Records of the Convention*"). "One of [the Articles'] vices [wa]s the want of an effectual controul in the whole over its parts." *Id.*

James Madison also recognized that the failings of the first Union and the need for a new Constitution were largely the result of the states' abusive laws and disregard for national authority under the Articles. *See* Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* 76, 107 (1995) (noting Madison's "alarm about abuses in the states . . . [which he] traced to the debilities of the Confederation"). "At the heart of Madison's thinking lay a deep concern with the process by which laws were enacted, enforced, and obeyed, and an overriding conviction that the legislatures created by the state constitutions of 1776 had failed to discharge their duties fairly and responsibly."

Jack N. Rakove, *James Madison and the Creation of the American Republic* 45 (1990) (hereinafter "Rakove, *James Madison*").[3]

Thus, when the Constitutional Convention opened, Madison championed a broad set of proposals to address the abuses by the states. These proposals, introduced on the first day of the Convention as part of Edmund Randolph's "Virginia Plan," were primarily designed to constrain the states' tendency to act in disregard of the law of the Union. 1 *Records of the Convention*, at 20-22 (May 29, 1787); Letter from James Madison to Edmund Randolph (Apr. 8, 1787), *in* 9 *The Papers of James Madison 9 Apr. 1786-24 May 1787*, at 368-70 (Robert A. Rutland et al. eds., 1975); *see also New York v. United States*, 505 U.S. 144, 164 (1992) (noting prominence of the Virginia Plan in the Convention debates). As set forth in the Virginia Plan, Madison envisioned both a legislative and judicial means of accomplishing this goal, proposing that (1) a federal judiciary, consisting of both a Supreme Court and inferior courts, be formed with the power to resolve all questions of national "law"; and (2) the new Congress be given a "negative" -- that is, the power to veto any state law found by Congress to contravene the national interest. *See* Rakove, *James Madison*, at 51.

Madison's proposals provided the framework for the Convention's early debates, as the Committee of the Whole, consisting of the entire membership of the Convention, considered the Virginia Plan. Although the Committee ultimately changed many details of Madison's plan, "[i]t did so following a pattern . . . that persisted throughout the Convention -- the dilution of Madison's nonjudicial constraints in favor of some form of review by federal judges whose independence from political influences and other 'judicial' qualities were strictly protected." James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 Colum.

---

[3] Madison was the "leader" of the Constitutional Convention, *Myers v. United States*, 272 U.S. 52, 115 (1926), and may justly be called the "father of the Constitution." *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 n.9 (1994); *see also Printz v. United States*, 521 U.S. 898, 910-15 (1997) (relying on Madison's writings).

L. Rev. 696, 715 (1998) (hereinafter "Liebman & Ryan"); *see also* Lawrence Gene Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 46-48 & n.81 (1981) (hereinafter "Sager") (noting that "judicial supervision [was] the Convention's chosen means of controlling the states").

Madison's proposed legislative negative suffered a quick death at the Convention due to fears that it would allow Congress to "enslave the States." 1 *Records of the Convention*, at 162-63, 165, 168 (June 8, 1787) (statement of Elbridge Gerry). Preferring a different mechanism for assuring the supremacy of federal law, the delegates immediately followed the negative's defeat with the unanimous adoption of a Supremacy Clause, binding all courts, and most particularly the state courts, to the principle that federal law constituted "the supreme law" of the land. 2 *Records of the Convention*, at 28-29 (July 17, 1787); *see also* Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 Stan. L. Rev. 1031, 1047 (1997) (hereinafter "Rakove, *Origins of Judicial Review*") (linking the negative's defeat and the advent of the Supremacy Clause).[4]

The defeat of the legislative negative reflected the Framers' desire to have the judiciary, rather than the legislature, guarantee the "supremacy" of federal law. As Gouverneur Morris argued, the legislative negative was unnecessary because the state courts' obligations under the Supremacy Clause, coupled with federal judicial review of state decisions and national legislative powers, would suffice. 2 *Records of the Convention*, at 28 (July 17, 1787). The concept of a legislative negative was reintroduced several times during the Convention. *See id.* at 27-28, 382-91. Each time, the

---

[4] In its initial form, the Supremacy Clause applied only to "Acts [of Congress] and Treaties." Rakove, *Original Meanings*, at 172-73 (quoting Article 6 of the New Jersey Plan). Over the course of the Convention, the delegates followed their pattern of establishing effective federal judicial review by significantly broadening the scope of the Supremacy Clause, amending the Clause to cover "the Constitution." *Id.* at 173-74 (noting Committee of Detail's revisions).

negative was defeated based on a preference for judicial means for constraining the states' power. *See id.* at 21-22, 28, 382, 391.[5]

2. The Form and Role of the Federal Judiciary.

Given doubts about the legislative negative, and a preference for entrusting the enforcement of the supremacy of federal law to the federal judiciary, the Framers shifted to addressing the structure of that judiciary. The initial debates focused on whether the federal judiciary should consist solely of one Supreme Court, or whether there was a need to establish inferior federal courts. 1 *Records of the Convention*, at 119, 124 (June 5, 1787).

Many of the delegates who favored a weaker federal government argued that state courts should serve as the court of original jurisdiction in all cases arising under national law, and that a single federal Supreme Court exercising mandatory appellate jurisdiction in all cases could keep the state courts in check without the help of appellate review by "inferior" federal courts. *See* 1 *Records of the Convention*, at 119, 124-25 (June 5, 1787) (statements of John Rutledge and Roger Sherman). Neither these nor any other delegates objected, however, to the general principle that the federal judiciary should have appellate jurisdiction to "assur[e] . . . the supremacy and uniformity of federal law in cases decided by the state courts." Paul M. Bator, *Congressional Power Over the Jurisdiction of the Federal Courts*, 27 Vill. L. Rev. 1030, 1038-39 (1982); *see also* Liebman & Ryan, at 718 (emphasis in original) ("[w]hat was not at issue was *whether* the national government should have authority to assure supremacy of national law over state law," but how that authority would be divided among the federal judiciary). "It was plainly not intended that the system

---

[5] *See also* 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 554 (1866) (June 20, 1788 statement of John Marshall at Virginia ratifying convention) ("To what quarter will you look for protection from an infringement on the Constitution, if you will not give that power to the judiciary?").

could work effectively with the state courts as courts of *last* resort on issues of federal law." Bator, at 1038-39.[6]

Madison and his allies, however, doubted the ability of a single Supreme Court to handle the burden of mandatory appellate jurisdiction from all state court rulings, and thus feared that the proposed approach would not effectively constrain unjust state laws. 1 *Records of the Convention*, at 124-25 (June 5, 1787); *see also* Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* 10 *The Papers of James Madison 27 May 1787-3 Mar. 1788*, at 211 (Robert A. Rutland et al. eds., 1977). Madison and his allies were also convinced that politically vulnerable state judiciaries could not effectively police state law, and could not be expected to follow and enforce federal law, without the backstop provided by accessible and effective federal judicial review. *See* 1 *Records of the Convention*, at 124 (June 5, 1787) (Madison: "What was to be done after Improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury?"). The result of this initial round of debates was the "Madisonian Compromise." Madison proposed, and the Convention approved, abandoning mandatory appellate jurisdiction in the Supreme Court in favor of allowing Congress to "appoint inferior Tribunals" and grant those courts original federal jurisdiction. *Id.* at 118, 125.[7]

Notably, Madison and the federalists, who favored expansive federal court jurisdiction, agreed to leave to Congress the power to

---

[6] By "appellate," the Framers did not mean the hierarchical system of courts that the term connotes today. Instead, the Framers used the term functionally to mean simply one court's review of the decision of another court. *See Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 337-39 (1816); *see also Felker v. Turpin*, 518 U.S. 651, 658-62 (1996).

[7] Later in the Convention, the word "appoint" was changed to "establish," removing any connotation that Congress could or should designate existing state courts as federal courts to hear federal disputes. *See* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39, 124-26; 1 Julius Goebel, Jr., *History of the Supreme Court of the United States: Antecedents and Beginnings to 1801* 211-12 (1971).

create the "inferior" federal courts only because they expected that Congress *would* exercise that power. As Madison understood, if any branch of government would be disposed as a matter of its own ambitions to expand national power -- and, in the process, to expand national judicial authority to facilitate that power -- it would be Congress. *See The Federalist No. 47*, at 309-10 (Isaac Kramnick ed., 1987) (Madison: "The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex. . . ."). This same reasoning led anti-federalist opponents of the Constitution, fearing broad federal court jurisdiction, to argue that placing a nationally ambitious Congress in charge of the grant of this jurisdiction was putting the fox in charge of the chicken coop. *See* Rakove, *Origins of Judicial Review*, at 1050 (citing "Brutus," Essay I, N.Y.J., Oct. 18, 1787, *reprinted in* 2 *The Complete Anti-Federalist* 363, 365-68 (Herbert J. Storing ed., 1981)); *see also* Herbert Wechsler, *The Courts and the Constitution*, 65 Colum. L. Rev. 1001, 1006 (1965) ("[G]overnments cannot be run without the use of courts for the enforcement of coercive sanctions and within large areas it will be thought that federal tribunals are essential to administer federal law. . . . The withdrawal of such jurisdiction would impinge adversely on so many varied interests that its durability can be assumed."). Thus, delegates on both sides of the debate understood the Madisonian Compromise as effectively guaranteeing the establishment of "inferior" federal courts.

3. The Jurisdiction of the Federal Judiciary.

The delegates understood that as a result of the Madisonian Compromise, and the need to spread out the Supreme Court's checking function across the entire federal judiciary, the lower federal courts were likely to be given significant jurisdiction to review state court decisions. Thus, shortly after the Madisonian Compromise, the delegates adopted Randolph's and Madison's proposal to delete the Virginia Plan's restriction of the Supreme Court to appellate jurisdiction and of the lower federal courts to original jurisdiction. 1 *Records of the Convention*, at 238 (June 13, 1787); *cf. id.* at 21-22. The new jurisdictional provision, defining the "jurisdiction of the national Judiciary" as a whole, created the

possibility that Congress would grant the Supreme Court original jurisdiction and, more important for this case, would grant the inferior federal courts jurisdiction to review state decisions. *Id.*

With this success in hand, the focus of Madison and the other delegates turned from whether the federal courts -- both Supreme and inferior -- would review state court judgments to what the nature of that review would be. The delegates first unanimously agreed to broaden the jurisdictional provision's original category of cases, which related only to the "collection of the Natl. revenue," to include all "cases arising under laws passed by the general Legislature." 2 *Records of the Convention*, at 39 (July 18, 1787); *see also id.* at 172-73 (Aug. 6, 1787) ("arising under" language of final report of the Committee of Detail). The delegates then unanimously expanded the jurisdictional provision again, this time changing the "arising under the laws passed by the general Legislature" clause to include cases "arising under" "this constitution." As delegate Rutledge stated in proposing this change, it was specifically intended to conform the "federal question" jurisdiction of the federal judiciary to the Supremacy Clause duties of state judges, and thereby to confirm the federal court's power and responsibility in cases within their jurisdiction to assure state judicial compliance with those duties. *Id.* at 422-24, 428, 430-31 (Aug. 27, 1787).

Years later, in an 1823 letter to Thomas Jefferson, Madison examined this link between the "federal question" jurisdiction of the federal judiciary and the responsibilities of the state courts. Rejecting the Virginia Court of Appeals' claim that the Supreme Court of the United States was not authorized to review state court decisions, Madison wrote:

> Believing as I do that the General Convention regarded a provision within the Constitution for deciding in a peaceable & regular mode all cases arising in the course of its operation, as essential to an adequate System of Govt. that it intended the Authority vested in the Judicial Department as a final resort in relation to the States, for cases resulting to it in the exercise of its functions, (the concurrence of the Senate chosen by the State Legislatures, in appointing the Judges, and the oaths & official

> tenures of these, with the surveillance of public Opinion, being relied on as guarantying their impartiality); and that this intention is expressed by the articles declaring that the federal Constitution & laws shall be the supreme law of the land, and that the Judicial Power of the U.S. shall extend to all cases arising under them . . . thus believing I have never yielded my original opinion indicated in the "Federalist" No. 39 . . . .[8]

Letter from James Madison to Thomas Jefferson (June 27, 1823), *in* 4 *Records of the Convention*, at 83-84.

4. The "judicial Power."

At the end of July 1787, the Convention formed the Committee of Detail to report a Constitution based on the debates thus far concluded. 2 *Records of the Convention*, at 85-86, 95-97, 106 (July 23-24, 1787). The Wilson-Rutledge Draft for the Committee, virtually identical to the final Committee report, contained the first reference to the "[j]udicial Power of the United States." *Id.* at 172-73 (Aug. 6, 1787). The draft and the subsequent report stated that the "[j]udicial Power" -- now codified in Sections 1 and 2 of Article III of the Constitution -- would be vested in the Supreme Court and such inferior courts as Congress might create. *Id.* The draft clearly differentiated this "judicial Power" (which "shall extend" to all federal judges) from the "jurisdiction" of the federal courts (which was separately listed and left largely to Congress to decide whether to confer and on what courts). *Id.*

---

[8] Madison used *The Federalist No. 39* to address the states' fears concerning federal jurisdiction over disputes between the states and the federal government. In doing so, he spoke to the qualitative attributes of the "judicial Power":

> [I]n controversies relating to the boundaries between the two jurisdictions, the tribunal which is *ultimately to decide* is to be established under the general government. But this does not change *the principle of the case*. The decision is to be *impartially made*, according to the *rules of the Constitution*; and all the *usual and most effectual precautions* are taken to secure this *impartiality*.

The Federalist No. 39, at 258 (James Madison) (Isaac Kramnick ed., 1987) (emphasis added).

Significant time during the remaining days of the Convention was dedicated to defining -- and defending -- this "judicial Power." The Framers, for example, rejected several proposals to weaken or eliminate the federal judicial independence and insulation from political control that the Framers had placed at the inviolable core of the "judicial Power." The Committee of Detail rejected an early proposal that would have required federal courts, exercising the "judicial Power," to issue advisory opinions at the behest of the political branches. 2 *Records of the Convention*, at 334-37, 341-43, 367 (Aug. 20-22, 1787). After the Committee of Detail reported to the Convention, the delegates also rejected all attempts to place limits on the cases to which the "Power" applied, such as by limiting it to cases in law or equity. *Id.* at 422, 425, 428, 621.

Perhaps most important for this case, the delegates rejected attempts to limit federal courts' power to decide the whole case -- by confining their duties to selected parts of it -- or to effectuate their decisions. Rejected, for example, were motions to limit federal appeals to construing purely legal provisions, rather than applying the law to the facts to resolve the case, and to limit federal decisions to matters of "law" rather than to matters of "law and fact." 2 *Records of the Convention*, at 424, 427 (Aug. 27, 1787); *see also id.* at 431 (Wilson's view that the appellate jurisdiction conferred by his existing Committee of Detail draft already was intended to reach the whole case). The Framers also rejected the New Jersey Plan's proposal to limit federal appellate jurisdiction over state "arising under" cases to the rendering of abstract opinions on the "construction" of federal law, while giving state courts the exclusive power to apply the law to the facts to reach a decision. *See* 1 *Records of the Convention*, at 243-45 (July 15, 1787) (listing New Jersey Plan's judiciary resolutions). Most crucially, the delegates specifically rejected proposals that "the judicial Power shall be exercised in such manner as the Legislature shall direct" or (in regard to lower courts) "in the manner, and under the limitations which [the Legislature] shall think proper." 2 *Records of the Convention*, at 425, 431 (Aug. 27, 1787).

The defeat of these proposals -- the last one in particular -- reaffirmed the Framers' insistence that, once the Congress created

inferior courts and gave them jurisdiction, it could not limit or direct the courts' exercise of the "judicial Power." *See* Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 Cath. U. L. Rev. 671, 733 (1997) (defeated "proposal was dangerously susceptible to abuse, for it gave Congress plenary authority not only over *jurisdiction*, but over the *judicial* power" and "might have empowered Congress to dictate . . . how [federal courts] should decide . . . cases").

5. Conclusion: The Framers' Intent.

To rectify the "vices" of the states under the Articles of Confederation, the Framers opted for a federal judicial, rather than legislative, review of state law and state court decisions to guarantee their consistency with national law. Toward that end, the Framers provided for a federal judiciary, consisting of a Supreme Court and inferior courts, which the Framers expected to exercise wide-ranging jurisdiction to review state decisions pursuant to the anticipated grant of power from a nationally ambitious Congress. Concerning the scope of that review, the intent of the Framers is clear: once Congress "ordain[s] and establish[es]" a federal court, that court exercises the "judicial Power of the United States." The "judicial Power," in turn, mandates that the federal court decide the whole federal question -- applying the law, as well as interpreting it -- based on the whole national law. Moreover, the federal court's decision cannot be limited to an advisory function: the Framers intended that the federal courts have the power to effectuate their decisions, thus making the "judicial Power" an "effectual power." *The Federalist No. 80*, at 445 (Alexander Hamilton) (Isaac Kramnick ed., 1987). In the words of Alexander Hamilton, the Framers "le[ft] the door of appeal as wide as possible" whenever Congress opened it. *The Federalist No. 81*, at 454 (Isaac Kramnick ed., 1987). The Framers considered -- and *rejected* -- any "limitation" on the federal judiciary's exercise of the "judicial Power," including the specific rejection of a proposal that would have allowed Congress to "direct" the exercise of the "judicial Power." 2 *Records of the Convention*, at 425 (Aug. 27, 1787).

II. THIS COURT HAS HELD THAT AN ARTICLE III COURT, EXERCISING THE "JUDICIAL POWER," CANNOT BE DIRECTED TO DEFER OR GIVE EFFECT TO A STATE COURT'S ERRONEOUS RULING OF LAW.

In its decisions, this Court has sedulously enforced the Framers' conception of the inviolable "judicial Power," holding that once an Article III court is "called into existence and vested with jurisdiction," that court "become[s] possessed of the [judicial] power." *Michaelson v. United States*, 266 U.S. 42, 65-66 (1924). Once so vested, "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative." *Id.* Among other things, this Court has forbade Congress to grant jurisdiction, and then order the Article III court to limit its ruling, by (1) deferring to Congress's or anyone else's determination that the state law or decision does not violate federal law; (2) deciding the case under any rule other than the "supreme Law of the Land"; or (3) deciding that a state law or decision violates the "supreme law," but nevertheless withholding relief sufficient to deny effect to the offending law. *E.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858); *Crowell v. Benson*, 285 U.S. 22 (1932); *see* Sager, at 69-74. In these and other cases, this Court has preserved the power of the Article III courts independently to interpret the entire law in deciding the "whole" case and in effectuating their rulings. *See* David E. Engdahl, *Intrinsic Limits of Congress' Power Regarding the Judicial Branch*, 1999 B.Y.U.L. Rev. 75, 134 ("Article III is a mandate 'to vest the whole judicial power.'") (quoting *Martin*, 14 U.S. (1 Wheat.) at 330).

A. This Court Has Long Guarded The "Judicial Power" From Unconstitutional Infringements.

The seminal case of *Marbury v. Madison* immunized all these aspects of the "judicial Power" from diminution by Congress.

5 U.S. (1 Cranch) 137 (1803). The *Marbury* Court reviewed section 13 of the 1789 Judiciary Act, which purported to confer original mandamus jurisdiction on this Court, and held that this grant of jurisdiction was "not . . . warranted by the constitution." *Marbury*, 5 U.S. (1 Cranch) at 174-76. In doing so, this Court rejected the view that an Article III court must defer to Congress's interpretation of the Constitution. William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 Duke L.J. 291, 314 (1996) ("The [*Marbury*] Court inquired into the constitutional interpretation on which the Judiciary Act depended for its validity; it took Congress's view into account . . . disagree[ing] with that interpretation (such as it was, as made by Congress); and it accordingly found that Congress had acted without authority . . . ."). Rather, an Article III court exercising the "judicial Power" is "requir[ed to exercise] independent judgment, not deference, when the decisive issue turns on the meaning of the constitutional text." Henry Paul Monaghan, Marbury *and the Administrative State*, 83 Colum. L. Rev. 1, 6, 9 (1983).

The *Marbury* Court also rejected the argument that Congress could direct Article III courts, faced with a statute in conflict with the Constitution, to "close their eyes on the constitution" and choose the statute as the rule of decision. *Marbury*, 5 U.S. (1 Cranch) at 177-79. In the words of Chief Justice Marshall, "[i]t is emphatically the province and duty of the judicial department to say what the law is . . . . If two laws conflict with each other, the courts must decide on the operation of each." *Id.* at 177. This, the Chief Justice said, is "the very essence of judicial duty." *Id.* at 178.

Finally, the Court refused in *Marbury* to rule that, so long as Article III courts can express an independent opinion on all legal issues in the case, Congress may deny them the power to effectuate their opinions by forbidding them to order relief. After holding section 13 of the Judiciary Act unconstitutional, the Court ruled that the statute was "absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign," and "discharged" the petition filed under it. *Marbury*, 5 U.S. (1 Cranch) at 173. Thus, the "judicial Power of the United States"

includes the power independently to decide a case properly before the court, to decide it in accordance with the "supreme Law of the Land," and to grant such relief as is necessary to effectuate the court's legal judgment.[9]

In *United States v. Klein*, 80 U.S. (13 Wall.) 128 (1871), this Court reaffirmed the conclusions reached in *Marbury*. *Klein* was a suit to recover property confiscated by the Union Army during the Civil War. Although certain Acts of Congress barred recovery for persons who had been disloyal to the Union, this Court, in *United States v. Padelford*, 76 U.S. (9 Wall.) 531 (1870), had implied in the previous Term that Article II of the Constitution required persons who had obtained presidential pardons to be treated as if they had been loyal. In response, Congress passed an Act (1) forbidding the Court of Claims, or any appellate court, to admit a pardon as evidence of loyalty; (2) requiring the Supreme Court to dismiss for want of jurisdiction any appeal of a case in which a pardon had been used as proof of loyalty; (3) making acceptance of a pardon conclusive proof of disloyalty; and (4) divesting courts of jurisdiction upon being presented with proof of a pardon. *Klein*, 80 U.S. (13 Wall.) at 143-44 (citing Act of July 12, 1870, ch. 251, 16 Stat. 230, 235).

In *Klein*, this Court unanimously held that each of the Act's mechanisms, designed to keep an Article III court vested with jurisdiction from effectually ordering legally mandated compensation for seized property, violated Article III as an infringement on the "judicial Power." *Klein*, 80 U.S. (13 Wall.) at 145-47; *id.* at 148 (Miller, J., concurring). This Court noted that Congress could have withheld jurisdiction entirely, or invoked sovereign immunity from the outset. *Id.* at 145. But having conferred jurisdiction and waived immunity, Congress could not

---

[9] As the *en banc* Ninth Circuit read *Marbury*, in a decision by then-Judge Kennedy: "If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and *the reality* of control by Article III judges over the interpretation, declaration, *and application* of federal law." *Pacemaker Diagnostic Clinic of America, Inc. v. Instro-Medix*, 725 F.2d 537, 544 (9th Cir.) (*en banc*), *cert. denied*, 496 U.S. 826 (1984) (emphasis added).

direct an Article III court's exercise of the "judicial Power." The Court began by rejecting the view that by forbidding courts to consider evidence of pardons, Congress could stop federal courts from determining Article II's impact on the case:

> [T]he language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect . . . .

Id.

The *Klein* Court next held that Congress could not tell an Article III court how to interpret the Constitution. The Act's directive to Article III courts to treat pardons issued pursuant to Article II as conclusive proof of disloyalty "passed the limit which separates the legislative from the judicial power." *Id.* at 147.

Finally, the Court expressly rejected Congress's attempt to forbid an Article III court from granting the relief needed to effectuate its independent judgment. To thwart that attempt, the Court struck down the Act's provision requiring an Article III court to divest itself of jurisdiction, or accept Congress's midstream invocation of sovereign immunity, at a point where the court determined that the Article II pardon would otherwise mandate relief. *Klein*, 80 U.S. (13 Wall.) at 146-47; *see* Sager, at 87-88 (identifying an "objection to legislation that . . . deprives [Article III courts] of jurisdiction to provide effective relief . . . at the very heart of . . . *Klein*").

Thus, as *Marbury* establishes and *Klein* reiterates, Congress cannot qualify the Article III court's responsibility to decide a case independently, to base that decision on federal constitutional and statutory law, and to issue relief sufficient to effectuate its legal judgment.

B. This Court Has Consistently Held That An Article III Court Cannot Be Limited In The Exercise Of The "Judicial Power" When Reviewing State Court Decisions.

1. Applying *Marbury* to Federal Judicial Review of State Court Decisions: *Cohens v. Virginia*.

In *Marbury* and *Klein*, this Court established that an Article III court may not defer to Congress in interpreting the Constitution in a case within the court's jurisdiction. Similarly, in *Cohens v. Virginia*, this Court held that once jurisdiction is granted, an Article III court may not defer to a state court interpretation of the federal Constitution, nor may the Article III court be deprived of the power to effectuate its own interpretation directly against the parties or, if need be, against the state court by binding it to abide by the federal judgment. 19 U.S. (6 Wheat.) 264 (1821). In *Cohens*, the State of Virginia questioned the need for federal courts to reverse state court decisions in any particular instance in which jurisdiction existed, citing the fact that federal courts do not have jurisdiction over all cases involving possible constitutional claims. *Id.* at 404-05. The state argued (precisely as the Fourth Circuit has ruled in this case) that reversal was necessary only in those "extreme and improbable" cases where a state court blatantly disregarded federal law. *Id.*; *see also id.* at 304-07 (argument of counsel).

Writing for the Court, Chief Justice Marshall acknowledged that Article III "does not extend the judicial power to every violation of the constitution which may possibly take place." *Cohens*, 19 U.S. (6 Wheat.) at 405. Still, the Chief Justice concluded that "if, in any controversy depending in a court, the cause shall depend on . . . [federal] law, that would be a case . . . to which the judicial power of the United States would extend." *Id.* at 405. Thus, the Chief Justice reasoned that the existence of jurisdiction obliged the federal court to decide the whole federal issue, no matter how close

or difficult it may be, in accordance with the court's independent application of federal law:

> It is most true that this Court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. *With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us.* We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. *Questions may occur which we would gladly avoid; but we cannot avoid them.* All we can do is, to exercise our best judgment, and conscientiously perform our duty.

Id. at 404 (emphasis added). The Court in *Cohens* further concluded that, to effectuate its view of the bearing of federal law on the case, the federal court has to possess the power to issue a binding judgment. *Id.* at 382-83, 413-15, 419, 421-22.[10]

---

[10] As noted in *Klein*, 80 U.S. (13 Wall.) at 145, Congress sometimes withholds federal jurisdiction to review state court decisions -- a limitation that litigants cannot circumvent by using grants of general jurisdiction to obtain review of state decisions. *See, e.g.*, Full Faith and Credit Act, 28 U.S.C. § 1738; Anti-Injunction Act, 28 U.S.C. § 2283. Congress also can limit the relief that a federal court may order. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1366 (1953) ("The denial of *any* remedy is one thing . . . . [b]ut the denial of one remedy while another is left open . . . can rarely be of constitutional dimension."); *see also Monell v. Department of Social Serv.*, 436 U.S. 658, 690-91 (1978) (damages *are* available if decisionmaker is implementing or executing policy). But Congress cannot grant an Article III court the jurisdiction to review state legal decisions and then direct that court to give effect to state decisions that are contrary to federal law. *Yakus v. United States*, 321 U.S. 414, 468 (1943) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instance may be the same thing, without regard to them.").

2. The "Paramount Judicial Authority" of Article III Courts: *Martin* and *Ableman*.

In *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816), this Court also embraced the principle that an Article III court must have the power to deny effect to state decisional law that, in the federal court's independent judgment, offends the Constitution. *Martin* concerned the Virginia Court of Appeals's refusal to enforce this Court's mandate in an earlier appeal from the Virginia Court of Appeals. The Virginia court decided not to follow the mandate because, in its judgment, this Court's decision was erroneous and beyond its competence. *See Hunter v. Martin*, 18 Va. (4 Munf.) 1, 49-50, 59 (1814). This Court ruled, however, that state courts lack authority, either directly or by ignoring this Court's mandate, to "revise [this Court's] own judgments." *Martin*, 14 U.S. (1 Wheat.) at 355.

This Court extended the same principle to lower federal court judgments in *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1858), where the Wisconsin Supreme Court had twice granted a federal prisoner a state writ of habeas corpus to free him from federal incarceration. Understanding the Wisconsin court's decision as an assertion of power to review the federal district court's judgment that the Fugitive Slave Act under which the prisoner was convicted was constitutional, this Court ruled that the federal district court "had exclusive and final jurisdiction by the laws of the United States; and neither the regularity of its proceedings, nor the validity of its sentence could be called into question in any . . . court . . . of a State . . . ." *Ableman*, 62 U.S. (21 How.) at 526. The Wisconsin court's decision, which effectively constituted state court review of a federal court decision, thus was invalid because it interfered with the federal district court's exercise of the "judicial Power":

> It has not only reversed and annulled the judgment of the District Court of the United States, but it has reversed and annulled the provisions of the Constitution itself, . . . and made

> the superior and appellate tribunal the inferior and subordinate one.

Id. at 522-23.

Martin and *Ableman* established that a state court cannot ignore or revise the judgment of an Article III court after-the-fact. This rule also applies with equal force where Congress has directed that an Article III court give the state court the last word on issues of federal law by deferring before the fact to a state court ruling. As this Court has repeatedly held throughout its history, all restraints on the "judicial Power" are indistinguishable in kind and therefore equally invalid:

> If the legislature cannot thus indirectly control the action of the courts, by requiring them a construction of the law according to its own views, it . . . plain[ly] cannot do so directly, by setting aside their judgments, compelling them to grant new trials, [or] ordering the discharge of [judicially convicted] offenders. . . .

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218, 225 (1995) (quoting Thomas Cooley, *Constitutional Limitations* 94-95 (1868)); *accord Clinton v. Jones*, 520 U.S. 681, 699-70 & n.31 (1997); *United States v. Sioux Nation*, 448 U.S. 371, 398 (1980); *Klein*, 80 U.S. (13 Wall.) at 145.

3. The "judicial Power" and Mixed Questions of Law and Fact: *Crowell* and its Progeny.

The basic contours of the "judicial Power" -- established by the Framers, affirmed by this Court in *Marbury* and *Klein*, and applied in *Cohens*, *Martin*, and *Ableman* to federal review of state court decisions -- mandate *independent* and *effectual* federal review of state court decisions whenever jurisdiction to review those decisions is granted. As the Framers themselves insisted, *see supra* Section I.B.4, this is true whether the Article III court is examining a state court ruling on a purely legal question or on a "mixed question of law and fact." Following this dictate, the Court repeatedly has held that, just as an Article III court may not defer to a state court ruling

on matters of pure "law," the Article III court likewise must independently review a state court's determination on "mixed questions of law and fact" whenever it implicates the meaning of federal law.

The Court enforced this rule in *Crowell v. Benson*. There, the Court addressed whether an Article III court can be required to defer to a prior administrative determination as to mixed questions of law and fact -- and thus exercise something less than independent and plenary review of those questions. The Court held that an Article III court could not do so:

> [T]he question is [one] . . . of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency . . . for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. . . . That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.
>
> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.

285 U.S. 22, 56-57, 60 (1932).

Although *Crowell* involved judicial review of an administrative determination, this Court shortly thereafter held that an Article III court similarly must engage in plenary review of *state court* determinations of mixed questions of law and fact. According to this Court, anything less than independent, plenary review would restrain an Article III court from "perform[ing its] own proper

function in deciding the question of law arising upon the findings which the evidence permits." *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123, 143 (1938); *see Norris v. Alabama*, 294 U.S. 587, 590 (1935) (in justifying its independent review of a state court's mixed "voluntary confession" conclusion, this Court held that "whenever a conclusion of law . . . as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured."); *Gallegos v. Nebraska*, 342 U.S. 55, 61 (1951) ("[Because Article III judges] ha[ve] been entrusted with power to interpret and apply our Constitution to the protection of the right of an accused to federal due process in state criminal trials, . . . [a] contrary rule would deny to the Federal Government ultimate authority to redress a violation of constitutional rights."); *Pierre v. Louisiana*, 306 U.S. 354, 358 (1939) (reaffirming principle that Article III courts have a "*solemn duty* to make independent inquiry and determination of [any] disputed facts") (emphasis added).

The rule established in this line of cases -- that an Article III court may not defer to a state court decision on matters of law, or on mixed questions of law and fact -- also applies in the context of habeas review. On habeas review, mixed questions of fact and law generally are treated "as issues of law" for which the Constitution compels plenary federal court review, including of state court determinations. *See Thompson v. Keohane*, 516 U.S. 99, 111 (1995) (noting multiple instances where this Court has treated mixed questions "as issues of law for § 2254 purposes").

If an Article III court defers to a "reasonable" state court decision as to mixed questions of law and fact -- a result that the Fourth Circuit below held is compelled by AEDPA -- that court neglects its constitutional duty to exercise the "judicial Power." As Justice O'Connor wrote in *Wright v. West*, an Article III court cannot "presume the correctness of a state court's legal conclusions on habeas, or [allow] a state court's incorrect legal determination . . . to stand because it was reasonable." 505 U.S. 277, 305 (1992) (O'Connor, J., concurring). Consequently, this Court has "always

held that federal courts, even on habeas, have an independent obligation to say what the law is." *Id.*

4. Conclusion: The "judicial Power" and AEDPA.

The habeas corpus statute requires Article III courts to review state court "decision[s]" to determine whether a prisoner is held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(c)(3), 2254(a) (1994); 28 U.S.C.A. § 2254(d)(1) (West 1994 & Supp. 1998). Despite this grant of federal question jurisdiction -- to which "[t]he judicial Power shall extend" under Article III -- the Fourth Circuit has read AEDPA to severely limit a federal court's habeas review of a prior state court decision. The ruling below requires an Article III court to defer -- either as a matter of legal interpretation or by denying relief necessary to effectuate an independent interpretation -- to a state decision that the federal court finds to be in violation of the Constitution, but that does not rise to the level of outrageous error required by the Fourth Circuit.

This view cannot be squared with the Framers' intent to ensure the supremacy of federal law through plenary, qualitative review of state decisions by Article III courts vested with jurisdiction by Congress. Nor can this view be squared with the Court's prior decisions. Beginning with *Marbury v. Madison* and continuing until today, this Court has held that once vested with jurisdiction, an Article III court must independently review and decide a case based on the "supreme Law of the Land," and must have the ability to grant relief sufficient to effectuate that judgment. An Article III court exercising the "judicial Power," but constrained on habeas review by the Fourth Circuit's interpretation of section 2254(d) of AEDPA, cannot help but "fail of its purpose in safeguarding constitutional rights." *Norris*, 294 U.S. at 590.

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

BARRY LEVENSTAM
Counsel of Record
JEFFREY T. SHAW
JEREMY M. TAYLOR
KENDRA S. COLLIER
JENNER & BLOCK
ONE IBM PLAZA
CHICAGO, IL 60611

Counsel for Amici Curiae

Dated: June 28, 1999